Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

No. 78-4

EARL M. POPE, DOLORES POPE, EDWIN E. POPE, DOLORES O. POPE, EDITH POPE,

Petitioners,

v.

CINCINNATI GAS & ELECTRIC CO., DAYTON POWER & LIGHT CO.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

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IN THE

SUPREME COURT OF THE UNITED STATES

No. ———

EARL M. POPE, DOLORES POPE, EDWIN E. POPE, DOLORES O. POPE, EDITH POPE,

Petitioners,

v.

CINCINNATI GAS & ELECTRIC CO., DAYTON POWER & LIGHT CO.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

This petition seeks review of *Cincinnati Gas & Elec. Co.* v. *Pope,* 54 Ohio St.2d 12 (1978), affirming *Cincinnati Gas & Elec. Co.* v. *Pope,* Case Nos. C-77107, C-77113, C-77114, Court of Appeals for the First Appellate District, Hamilton County, Ohio, May 3, 1977, both appended hereto.

JURISDICTION

The decision sought to be reviewed is dated and was entered by the Supreme Court of Ohio on April 5, 1978. No rehearing or extension of time within which to petition for writ of certiorari was sought or granted.

Jurisdiction is conferred upon this Court to review the judgment in question by 28 U.S.C. § 1257 (3).

QUESTION PRESENTED

Whether the Ohio eminent domain laws deny a property owner due process of law by providing that a judgment upholding a condemning authority's right to take private property is, under § 163.09 (B), Ohio Revised Code, not final and reviewable where, under § 163.15, Ohio Revised Code, that judgment, after a subsequent valuation hearing, gives the condemning authority the immediate right to take possession of the property, which right, under § 163.19, Ohio Revised Code, cannot be stayed pending appeal.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

CONSTITUTION OF THE UNITED STATES:

ARTICLE VI

Clause 2 This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

AMENDMENT XIV

§ 1 All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

CONSTITUTION OF THE STATE OF OHIO (1851):

ARTICLE I

§ 16 All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay.

Suits may be brought against the state, in such courts and in such manner, as may be provided by law.

§ 19 Private property shall ever be held inviolate, but subservient to the public welfare. When taken in time of war or other public exigency, imperatively requiring its immediate seizure or for the purpose of making or repairing roads, which shall be open to the public, without charge, a compensation shall be made to the owner, in money, and in all other cases, where private property shall be taken for public use, a compensation therefor shall first be made in money, or first secured by a deposit of money; and such compensation shall be assessed by a jury, without deduction for benefits to any property of the owner.

OHIO REVISED CODE:

Section 1.47, Ohio Revised Code.
Section 163.08, Ohio Revised Code.
Section 163.09, Ohio Revised Code.
Section 163.14, Ohio Revised Code.
Section 163.15, Ohio Revised Code.

The complete texts of the above-cited sections of the Ohio Revised Code are appended hereto.

STATEMENT OF THE CASE

This action arises out of an attempt by two Ohio electric utility companies, the Cincinnati Gas & Electric Co. and the Dayton Power & Light Co., to acquire private property in an appropriation proceeding under Ohio Revised Code Chapter 163.

These proceedings began in February of 1975 when the two Respondent utility companies, the Cincinnati Gas & Electric Co. and the Dayton Power & Light Co., filed three separate complaints against Earl and Dolores Pope, Edwin and Dolores O. Pope, and Edith Pope, Petitioners herein, as owners of three contiguous parcels of property located in southwest Hamilton County, Ohio. By these complaints, the Respondents sought to acquire an easement across the properties of the Petitioners for the purpose of constructing a high-voltage (345,000 volt) transmission line. The three cases were consolidated for the purposes of trial and of appeal, and no further distinction need be made among them.

After almost three years from the time of the filing of the complaints, the cases were tried to the Court of Common Pleas of Hamilton County in September of 1976, and (after a denial of the Respondents' motion for a directed verdict) in January of 1977, consuming approximately ten trial days. On January 18, 1977, the court entered an oral opinion ruling that the Respondents were entitled to appropriate the easements which they sought.[1] The judg-

[1] Appendix, p. 1a.

ment entry determining the right to take further ordered that "this case be set for trial by a jury as provided by law" on the question of valuation.[2]

Petitioners filed notices of appeal from this judgment on February 11 and February 15, 1977. On March 21, 1977, the Respondent utility companies filed a motion to dismiss the appeals. In their memorandum contra and in oral argument before the Courts of Appeals, Petitioners argued that dismissal of the appeals would deny them due process of law. On May 3, 1977, the Court of Appeals for the First Appellate District, Hamilton County, Ohio granted Respondents' motion to dismiss the appeals.[3]

The Petitioners filed a timely motion asking the Supreme Court of Ohio to take jurisdiction of the cases. To the Supreme Court of Ohio the Petitioners presented the following proposition of law which involves a constitutional question of due process:

> "An Order of the Court of Common Pleas in an Appropriation Proceeding Brought Pursuant to Chapter 163 of the Ohio Revised Code Determining the Issue of Necessity Adversely to the Property Owner Is a Final and Appealable Order."

In support of this proposition of law Petitioners argued,

> "The decision of the Court of Appeals in this case to dismiss the [Petitioners'] appeal denies to property owners fundamental elements of due process. The right to protect one's property and to defend against arbitrary and unlawful appropriations is a right which has been recognized as paramount." Memorandum in Support of Jurisdiction, p. 12.

[2] Appendix, p. 10a.

[3] Appendix, p. 12a.

The Supreme Court of Ohio accepted jurisdiction of the consolidated cases on September 9, 1977. The due process question was briefed by Petitioners and Respondents. The Supreme Court of Ohio heard oral argument on January 30, 1978.

On April 5, 1978, the Supreme Court of Ohio affirmed the dismissal of Petitioners' appeals by the Court of Appeals.[4] In its opinion, the court rejected Petitioners' arguments that the dismissal of their appeals was unconstitutional and denied them due process of law.[5] It is on this decision of the Supreme Court of Ohio affirming the dismissal of Petitioners' appeals that a writ of certiorari is herein sought.

The Facts

The facts which were presented to the Court of Common Pleas concerning the question of whether the Respondent utility companies had abused their discretion and had acted in bad faith in condemning the Petitioners' property are not relevant to this petition. The only issue is whether the Petitioners may appeal the Respondents' right to take at this time.

The only relevant facts are procedural facts, which of course, are uncontested and a matter of record. Specifically, the relevant facts are that a hearing was held in the Court of Common Pleas to determine the question of the Respondents' right to take the property which they sought to condemn. After a lengthy evidentiary hearing, that court ruled for the Respondents. The Petitioners appealed to the Court of Appeals from the judgment. The Court of Appeals dismissed those appeals upon motion of the Respondents. The Supreme Court of Ohio affirmed the dismissal of the appeals.

Section 163.09 (B), Ohio Revised Code, specifically provides that a decision adverse to a property owner at this stage of an appropriation action is not a final order. Therefore, under Ohio law Petitioners may not appeal Respondents' right to take until such time as, under § 163.15, Ohio Revised Code, Respondents have the right of possession of the property. Another section, § 163.19, provides that, during that appeal, the court has no power to stay the construction activities which may be undertaken during the pendency of the appeal, even if that activity involves, as it does here, irreversible damage to a fragile hillside. Petitioners question the constitutionality of that restriction on the timing of an appeal of Respondents' right to take Petitioners' property by appropriation.

REASONS TO ALLOW WRIT

This petition asks this Court to review the constitutionality of the statutory appeal provision contained in Chapter 163 of the Ohio Revised Code applicable to actions for the taking of private property be eminent domain in Ohio. Petitioners contend that the provision in § 163.09 of the Ohio Revised Code upon which the Court of Appeals apparently relied in dismissing Petitioners' appeal is an unconstitutional provision which acts to deprive Petitioners

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[4] *Cincinnati Gas & Electric Co., et al.* v. *Pope, et al.*, 54 Ohio St.2d 12 (1978).

[5] In response to Petitioners' argument that the Ohio appellate procedures in appropriation cases denied them due process of law guaranteed by the Fourteenth Amendment of the United States Constitution and art. I, § 16 of the Ohio Constitution, the Ohio Supreme Court stated:

> "The due process of law to be observed whenever private property is appropriated for public use is set forth in Section 19, Article I of the Ohio Constitution, ..." 54 Ohio St.2d at 18.

of the only meaningful appeal of an adverse decision which they will ever be able to make at a meaningful time and in a meaningful manner. *Armstrong* v. *Manzo,* 380 U.S. 545, 552 (1965).

In its affirmance of the dismissal of Petitioners' appeals, holding constitutional the mandatory delay for appealing the issue of the right of the condemning authority to appropriate the property until after the valuation hearing and transfer of the property, the Supreme Court of Ohio has in effect eliminated the right to any real judicial review of the appropriation of private property in the courts of Ohio.

This case presents to this Court a rare opportunity to determine the extent of the constitutional due process deprivations in the appellate procedure mandated by Ohio law in eminent domain actions. The issue raised by this petition can only be presented for review in the procedural posture of this case, namely that of a property owner seeking immediate review of an adverse ruling on the issue of the condemning authority's right to take in the face of a statutory prohibition against an appeal at this stage of an appropriation action.

It is submitted that only review by this Court of the judgment of the Supreme Court of Ohio can bring Ohio's procedures of appellate review of appropriation of private property into accord with the due process of law guaranteed to owners of private property under the Fourteenth Amendment to the Constitution of the United States.

The Ohio Eminent Domain Proceeding

Section 163.09 of the Ohio Revised Code appears to provide for a review of a judgment adverse to the property owner, but, in operation in connection with other re-

quirements of Chapter 163, actually eliminates the power of the Court of Appeals to effectively review a judgment in an appropriation case adverse to the property owner on the question of necessity and to provide relief to the property owner.

Chapter 163 of the Ohio Revised Code establishes a bifurcated procedure in eminent domain cases. If a property owner wishes to show that the appropriating authority has abused its discretion, has acted in bad faith, or has otherwise violated the constitutional provisions of § 19 of Article I of the Constitution of the State of Ohio, or is otherwise legally incompetent to condemn the property sought, the property owner is first required to raise those defenses in an answer.[6] Those factual issues are then tried to the Court of Common Pleas, sitting without a jury.[7] If the Court of Common Pleas enters judgment for the defendant property owner, that order terminates the case and is obviously a final and appealable order for the purposes of appeal. However, if the Court of Common Pleas determines the issues adversely to the property owner and holds that the condemning authority may proceed, then Ohio law specifically provides that such an order "in favor of the agency [utility company] on any of such questions [of necessity] shall not be a final order for purposes of appeal."[8] Rather, the case continues and the matter is referred to a jury, which then proceeds to determine the value of the property in order to compensate the property owner.[9]

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[6] § 163.08, Ohio Rev. Code.

[7] § 163.09(B), Ohio Rev. Code.

[8] § 163.09(B), Ohio Rev. Code.

[9] § 163.14, Ohio Rev. Code.

The end product of that procedure is a judgment entry which not only reflects the jury's determination and orders a specified compensation to be paid to the defendant, but is also a certificate of title which transfers ownership of the parcel sought to be condemned (or of a lesser interest, such as an easement) to the plaintiff utility company.[10] Only after all of this has been accomplished, including the actual transferral of ownership, does the statutory procedure contemplate an appeal to the Court of Appeals. Finally, Ohio law provides specifically that the pendency of an appeal after the valuation hearing may not affect the condemning authority's right to use the condemned land during the appellate process.[11]

For obvious reasons, this is the procedure which Respondents would prefer to follow in this case. This procedure denied to Petitioners any right to have their case reviewed until after the valuation hearing and until after their property has been transferred to the utility company. Of course, once the utility company owns the parcel or the easement, construction work upon the project can begin.[12]

Obviously, considering the time ordinarily consumed in processing a case upon appeal, even if expedited, the utility companies can have the project which is contemplated for the properties involved completed long before an appellate court is in any position to review this case. At that time, any meaningful relief would be impossible to grant the property owners. The alteration of real estate is generally considered an irreparable injury. *Adams* v. *Snouffer*, 88 Ohio App. 79, 44 Ohio Op. 17 (1949).

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[10] § 163.15, Ohio Revised Code.

[11] § 163.19, Ohio Rev. Code.

[12] § 163.19, Ohio Rev. Code.

The Supreme Court of Ohio has acknowledged the potential for injury to the Petitioners' property under the appellate review procedures contained in Chapter 163, Ohio Revised Code.

> "[W]e recognize that because of the balance struck within R. C. 163.19 there is the possibility that the contested property might be damaged by the appropriating agency after it acquires title thereto under R. C. 163.15, only to be later restored, in this damaged condition, to the property owner who successfully appeals the preliminary issues." 54 Ohio St.2d at 19.

The comment of the Supreme Court of Ohio as to the availability of expedited appeallate review after the valuation hearing and the transfer of the property hardly serves to cure the defect of the lack of finality of an order under § 163.09 (B).[13] This proffered solution cannot prevent irreparable damage to Petitioners' real property during the pendency of an expedited appeal, nor has the Supreme Court of Ohio dealt with the problem of judicial reluctance to halt a construction project once it is underway. See *Nashville I-40 Steering Comm.* v. *Ellington*, 387 F.2d 179 (6th Cir.), *cert. denied*, 390 U.S. 921 (1967).

Petitioners believe it is clear that Ohio's statutory appellate procedures for appropriation actions is structured in such a way as to moot an appeal on the condemning authority's right to take before the appeal can be heard or

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[13] "It is therefore imperative that the property owner who prosecutes an appeal on other than the jury award of compensation adequately inform the appellate court of his dilemma, so that the appellate court might implement the special provision of Ohio Revised Code § 163.22, which mandates that '[a]ll proceedings brought under sections 163.01 to 163.22, inclusive, * * * shall be advanced as a matter of immediate public interest and concern and shall be heard by the court at the earliest practicable moment.'" 54 Ohio St.2d at 19

decided. It is submitted that this statutory appellate procedure violates the due process clause of the Fourteenth Amendment to the Constitution of the United States.[14]

Denial of Due Process

Due process of law is one of the central concepts of Anglo-American constitutional law. From the origins of our system of law, private property has been protected from being taken by the powers of the sovereign. Article 39 of the Magna Carta (1215) provided that no man be deprived of his freehold unless by the lawful judgment of his peers and by the law of the land.[15] The phrase "by the law of the land" is synonymous with the phrase "due process of law." *Holden* v. *Hardy*, 169 U.S. 366 (1898); *State ex rel.* v. *Guilbert*, 56 Ohio St. 575, 616 (1897).

This protection is embodied in the due process clauses of the Fifth and Fourteenth Amendments of the Constitution of the United States. The words "due process of law" are intended to guarantee not only that the individual be free from the arbitrary deprivation of life or liberty by the power of the state, but also to guarantee to the individual that he be free from the arbitrary spoilation of property. *Missouri Pacific R. Co.* v. *Humes*, 115 U.S. 512 (1885). The due process clause of the Fourteenth Amendment

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[14] It should be emphasized that the constitutional restriction against the taking of private property except in accordance with due process of law should be distinguished from the restriction against the taking of private property without compensation. The two restrictions are different, and the right to be compensated by the state for the taking of property is not a right which is involved in this appeal. The constitutional deprivations which form the basis for this appeal pertain solely to the fact that the State of Ohio has established procedures whereby land may be appropriated in violation of minimal due process guarantees.

[15] Appendix, p. 26a.

guarantees that any action by a state through any of its agencies must be consistent with the fundamental principles of liberty and justice which lie at the base of our civil and political institutions. *Buchalter* v. *State of New York*, 319 U.S. 427, 429 (1943). And while personal and criminal rights have received much recent judicial attention, the protection of property rights by due process of law has been reaffirmed by this Court.

> "The Fourteenth Amendment places procedural constraints on the actions of government that work a deprivation of interests enjoying the stature of 'property' within the meaning of the Due Process Clause." *Memphis Light, Gas & Water Division* v. *Craft*, —— U.S. ——, 56 L.Ed. 2d 30, 39 (1978).

The Supreme Court of Ohio erred in its determination of what process is due a property owner after a decision adverse to the property owner on the question of whether the condemning authority had the right to appropriate the property. The Court stated:

> "The due process of law to be observed whenever private property is appropriated for public use is set forth in Section 19, Article I of the Ohio Constitution . . . ."

The Supreme Court of Ohio, while ostensibly responding to Petitioners' argument that they had been denied due process guaranteed by the Fourteenth Amendment of the United States Constitution, interposed a provision of the Ohio Constitution by way of answer; the Ohio Supreme Court thereby ignored art. VI, clause 2 of the Constitution of the United States.

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Au-

> thority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

It is submitted that a provision of the Ohio Constitution cannot be used to cut off rights guaranteed Petitioners under the Constitution of the United States.

While it is true that Ohio need not provide any appeal at all from an adverse decision in an appropriation action, this Court has held quite clearly that once a state grants the right of appellate review, it must grant that right equally to all. *Griffin* v. *Illinois,* 351 U.S. 12 (1956). It is apparent here that those who are deprived of an effective right of appellate review in proceedings pursuant to Chapter 163 of the Ohio Revised Code are only those who choose to contest the validity of the appropriation. (Those who contest only value are provided a full appeal, the result of which is capable of execution.) The State of Ohio appears to provide Petitioners with an appeal, but that appeal can have no effect and a reversal is incapable of execution because the property will long since have been irreparably damaged.

> "The State is not free to produce such a squalid discrimination. . . . The State cannot keep the word of promise to the ear of those illegally convicted and break it to their hope." *Griffin* v. *Illinois,* 351 U.S. 12, 24 (1956) (Mr. Justice Frankfurter, concurring).

Thus the statement by the Ohio Supreme Court that "[t]his court has repeatedly stated that there is no inherent right of appeal from a judgment of a court, and that such right must be conferred by Constitution or statute" (54 Ohio St.2d at 18) does not deal with the question of

whether due process is denied if the appellate procedure provided by state law is a meaningless exercise.

In any event the Ohio legislature *has* granted property owners the right to appeal from an adverse ruling on the question of the plaintiff's right to take property by the power of eminent domain. Under the rules of statutory construction it must be presumed that the Ohio legislature intended that appeal to be a meaningful appeal, or the legislature would not have provided for any appeal at all.

> "In enacting a statute, it is presumed that: . . .
>
> "(C) A just and reasonable result is intended;
>
> "(D) A result feasible of execution is intended."
>
> Section 1.47, Ohio Revised Code.

If Petitioners' appeal is delayed until after the valuation hearing by operation of Section 163.09(B), Ohio Revised Code, then, under Section 163.19, Ohio Revised Code, Respondent utility companies will have the right to irrevocably alter and significantly damage the Defendants' property by constructing upon it a series of large towers to support a very high-voltage electric transmission line. The effect of this procedure is to discourage appeals, even in meritorious cases, since a property owner will not wish to bear the cost of an appeal which will not provide any meaningful relief. Thus, the state has granted only the appearance of due process and has in fact stacked the appellate deck against the property owner to such an extent that his only reasonable option, under the state's rules, is to drop out of the game.

The Fourteenth Amendment of the United States Constitution provides that a deprivation of property is to be

accorded the same due process protections as a deprivation of life or a deprivation of freedom, and yet it would be absurd to suggest that justice would be served or due process guarantees realized by providing a defendant convicted of capital crime with the full rights to an appeal only after the sentence of execution has been carried out. Similarly, a property owner who is denied the right to appeal an appropriation of his property until after possession is transferred to the condemning authority has clearly been denied due process of law.

The only justification advanced for the mandatory delay in appealing the condemning authority's right to take Petitioners' property is "speedy construction" of a public project. 54 Ohio St. 2d 12, 18.[16] The statutory procedures contained in Chapter 163 constitute the elevation of expeditious procedure over the rights and interests of the citizens and property owners of the state. This Court has noted repeatedly that the Constitution of the United States recognizes higher values than speed and efficiency. *Stanley* v. *Illinois,* 405 U.S. 645, 656 (1972). Petitioners submit that it is not rational to sanction "speedy construction" of a public project while acknowledging that the transfer of the condemned property to the appropriating agency is "subject to defeasance" should the property owner prosecute a successful appeal. 54 Ohio St. 2d 12, 19.

In addition, the long jury trial on land valuation is a significant use of judicial resources and should not be required until an appellate court has first determined that

[16] The Ohio Supreme Court clearly overlooked the fact that the Respondent utility companies in this case are hardly in a position to urge that the case proceed expeditiously inasmuch as they waited almost two years after filing the case before trying it, despite the fact that Chapter 163 provides that such cases may be tried within fifteen days of the filing of the answer.

the plaintiff does have the right to condemn the property.[17] The burden on the appellate process is less than the burden imposed on the trial process, which compels the parties, the trial courts, and juries to determine the value of a parcel which may well prove to be unnecessary by an adverse appellate ruling.[18] It is submitted that there is no rational basis for use of the substantial judicial resources which a jury trial on valuation would entail before it is certain that any compensation is to be paid; if Respondents have no right to take the property, then Petitioners have no right to be compensated.

Finally, the conventional remedy of a stay pending appeal is also denied to the Petitioners by § 163.19 of the Ohio Revised Code, which provides that once the condemning authority pays to the property owner or pays into court the amount of the award assessed by the jury, "the right to take and use the property appropriated shall not be affected by such review by the appellate courts.[19]

[17] The Ohio Supreme Court has erroneously characterized the Respondents' right to take Petitioners' property as a preliminary issue. 54 Ohio St.2d 12, 19. The right to take is by no means preliminary, but rather is the ultimate issue.

[18] This is especially true where the Court of Common Pleas specifically noted that "although I have had a number of difficult decisions, this has been one of the most difficult. I have made my mind one way and then I've rethought and tried to write it out one way in my mind and then I've changed my mind, and I've done that several times." Appendix, p. 2a.

[19] Even if a stay pending appeal were available, the supersedeas bond required of the Petitioners would not be measured by the value of the interest taken or by the jury's determination of value; rather, the Respondents would surely argue that the bond must be measured by the value of the project which is enjoined and the harm caused to the Respondents thereby. In any event, regardless of the measure of the bond, constitutional rights may not be premised upon the payment of a fee. *Harper* v. *Virginia State Bd. of Elections,* 393 U.S. 663 (1966). This is particularly true where the due process deprivation complained of involves a question of access to the courts. *Boddie* v. *Connecticut,* 401 U.S. 371, 375 (1971).

There exists no rational basis for the deprivations inherent in Ohio's statutory procedure, which provides a person an appeal in an appropriation case only after the property which he is trying to protect has been irrevocably altered or destroyed. It is neither just nor reasonable for the state to provide a party an appeal when the reviewing court no longer has the power to effectuate its judgment. The protection of private property is the keystone of Anglo-American law. Accordingly, it is submitted that this case, involving as it does the right of property owners to protect their property rights before the property is altered or destroyed, is a case of significant public interest which this Court should decide.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

THE CINCINNATI GAS AND ELECTRIC COMPANY,

Plaintiff,

vs.

THE DAYTON POWER AND LIGHT COMPANY,

Defendant.

Case Nos. A-751384-5-6

JUDGE GILBERT BETTMAN

JUDGE'S DECISION

APPEARANCES:

C. R. Beirne, Esq.,
Counsel for Plaintiff,

Timothy A. Fischer, Esq.,
Counsel for Defendant.

MORNING SESSION, TUESDAY, JANUARY 18, 1977

JUDGE'S DECISION

THE COURT: After all the careful detailed and complete work that has been done by counsel for both sides

in this case, the Court would like to have had the chance to prepare a tightly reasoned and complete opinion covering all the points that you have raised, both legally and factually. Unfortunately, time simply doesn't permit my doing that, and, therefore, I'm going to have to speak more or [2] less as it comes out.

As you know, I followed the evidence carefully, throughout these number of days that we have tried the case. I've listened to your arguments and I have studied your briefs. In addition to that, I went out a couple of weeks ago and spent a few hours driving around through the area, just to refresh my recollection as to the, as to make the evidence more clearly, by renewing my view.

I have to say to you that this has been, although I have had a number of difficult decisions, this has been one of the most difficult. I have made my mind one way and then I've rethought and tried to write it out one way in my mind and then I've changed my mind, and I've done that several times. The problem, obviously, of balancing individual rights and general community needs is exemplified by the need to, for electrical power. That is a difficult balance to try to achieve.

I might say I started with some background. None of us are without our lifetime experiences. I grew up with a house with a riverview which my father and all of us were very fond. I also got myself into a position back in the forties of being a chairman of the Citizens Committee to save Burnett Woods and keep the University from encroaching any further on it. So that my initial reaction to this case [3] was it just seemed a shame to run a transmission line along the side of this quite beautiful, rich land, overlooking the White Water Valley.

Furthermore, it was obvious in the evidence, which has made it even more real by view of the premises, as Mr.

Pope has put it himself, I think quite correctly, the Great Miami Valley, in that area, is already, from an environmental point of view, the defiled talks of putting a park there, or making it into a recreational area, or an unrealistic dream.

The Gulf Refinery Company is there, it is going to be there, probably, more or less, forever, for our purpose. The gravel pits are going to be there another 30 or more years. It is a pretty junky valley.

Having had those initial thoughts, I again reviewed what the law is, and of course, we are governed by 163.09 (B), that the necessity, decision of the Gas and Electric Company is prima facie evidence in the absence of proof of the abuse of discretion.

And the Ohio cases that interpreted this, as you all are familiar, and I'm not going to burdon your with reading much of them, but to take the Cleveland Electric Illuminating versus Lesher, it was the Court of Appeals that reversed Judge Locher.

The Court said, "The Burdon is upon the defendant to prove that the proposed route is so defective they could [4] not have been the result of a reason in good faith in the exercise of discretion."

The Court of Appeals for our district, in the Nieman case, with which you are all familiar, says, "Where two lines for an electric transmission line are possible, it is discretionary with appropriating agency to select the route it will follow, and in the absence of fraud, bad faith or gross abuse of discretion, such determination will not be disturbed by the Court."

And then it goes on to quote some other authorities, "In the absence of legislative restriction and delegation of the power of Eminent Domain gives the grantee the power, the right to determine the location and route of

the improvement, and of the land to be taken for it, and such determination will not be interfered with by the Courts if it is made in good faith, and is not capricious or wantingly injurious evidence that another route is feasible is not sufficient to show that the grantee's selection constitutes bad faith, oppression or abuse of power."

So, as you all know, the Court is not free to make its own determination as to what the best route is. The issue is whether the defendants have established, by preponderance of the evidence, that the Gas Company's selection of this route is an abuse of discretion.

[5] If the test was that the Gas and Electric Company's route is not as good as one of the alternatives, I wouldn't have much trouble in finding in favor of the defense because I think almost any one of these other routes, as far as I personally would think, almost any one of them, or some combination or variation of the alternatives discussed in the evidence would be better.

Mr. Beirne, I think, put it well in his brief, "The sole issue is whether the particular reasons the utility had for its determination of necessity reveal that it failed to undertake a good faith effort to determine the necessity for the appropriation."

In weighing the evidence before us, in trying to reach this decision, I think we are all in agreement that the decision calls for a weighing of all the factors involved, environmental factors, engineering factors and economical factors. Unfortunately, there are many many facets to each of these problems.

How much visibility will the line have from this direction, from that direction, from this road, from that road. How much does it cost to put in a foundation on this kind of a slope, or in this river bottom, or here, or there. How many people will be put out by putting a line in this

direction, or that direction. What will the cost be to do this, or to do that.

[6] There's a huge number of factors and it's not a mathmatical problem to determine their comparative weight.

I might personally give one. Give great weight to the fact that you have to destroy some wooded area. Someone else may feel, well, it's much better to destroy a wooded area than it is to destroy a house, or to move a house. These are judgments.

The route that the gas company chose appears, from the evidence, to be straight, which is obviously economical not to displace any residences or businesses. It does have some screening or backdrop from different points of view.

The principal points that the defendants make is that, well, number one, that the building of the long line proposed pad will destroy a number of views from the edge of the ridge and I do think this is a very important environmental consideration and I think it is a consideration more than simply involving the Pope's individually, but involving, in the broad sense, the general welfare in that it is important to our society that properties with nice views not be destroyed.

However, we have to realize, in considering this, that we are not running a line now along over Columbia Parkway, which would run along all the front houses with Nolen, [7] Grandin Road, et cetera, we are running it along a line where there are presently no houses and it certainly is true that only a limited number of houses could be put along this ridge line. Only the ones that would be actually on the ridge line would have a view. There's a lot of flat area there. Once you get away from the rim the houses aren't going to have anymore view than any house with a wooded area. Maybe when they walk out of

their houses and go to the end of the street, yes. Otherwise, they wouldn't have any view that they could see out of a picture window.

That's one thing to remember. Another thing to remember is I don't think the evidence is entirely clear of exactly what the elevation of each point of this line is going to be along the line, or where exactly where the polls are, at least I haven't related them, but, it will be possible, I'm sure, in the development of this hilltop to adjust to some degree the location of your houses so they are not. You obviously aren't going to put one right behind the polls if the poll is sticking up behind that point.

Considering the thing from a broad point of view, too, although as I say, I think it is relevant that we are destroying some views with this line, and this is not the only location in Hamilton County where you can find locations with views, particularly in this day and age, with the opening of all these new super highways, it's easy to get [8] further out to the county and even beyond the county.

Second point that the defendants raised is this business of creation of a hiatus area. And, certainly I think that that concept is a sound concept. But, it is also true and I think it's obviously true that you are perfectly able to develop residential housing if that's what the best use for that area is in this so-called hiatus area. It isn't something which is completely destroyed for use, particularly in an area like this hilltop where you have quite a number of trees and with sound careful development so to preserve those trees, you could have a much nicer subdivision than some of the ones we saw in the pictures.

The third point the defendants raised was the problem of erosion. The conclusion that I couldn't help coming to, after hearing all the testimony on that is no question

we have erosion problems in this area on hillsides and specifically on this particular hill. But, what you are doing here is not the problem on these erosion hillsides, as I understand the evidence is that if you make a cut you then release the support of some of the slippage pressure and if you put a fill on the bottom side, you then add to the load which creates additional slipping going the other way.

Now, in the construction of these bases for [9] these towers I see no reason at all, and I think the evidence shows, supports this, shows us why we cannot take into account the fact that you have this certain type of geological hill and once you have placed your concrete in there and restore the slope to its natural slope why no reason at all why it shouldn't be just as nonslipable as it was before it went in. And, it would certainly create less of a slippage problem than the road going up the hill, which has to stay by its very nature, has to remain in the cut and fill condition.

The fourth point that was raised was the visibility from the new 275 which James Hough and Associates didn't include in their figures, how much weight this kind of thing should be given. I don't know, 275 is pretty far away, number one. Number two, the proposed route will, in affect, create the hill and the trees will create a backdrop for the poll line which, of course, reduces considerably his visibility from that distance.

Now, against the points that the defendant raised, the company had to weigh a great number of aspects and I'm not going to repeat them all, I had too much evidence. It's a problem of longer lines, there's a problem of visibility from this road, or that road. There are the same kind of erosion problems if you go over the hill near Hooven, or if you go around the hill a different way, if you

put the route [10] up through the valley you have certain kind of foundation problems. You again place the thing more out in the open so it is more visible. We had economic problems. There are a great many considerations that the gas company had to take into account in making its determination. I don't think there's much doubt human nature being what it is that having made their initial determination that they wanted the line to run in a certain, along a certain route, that it became psychologically difficult for them to change. Perhaps it is a little like getting a judge to reverse his decision on rehearing. But, after reviewing all of the evidence, I've concluded that they tried.

As I eluded to before, and this is a judgment call involving an infinite number of variables, and how you weigh what weight you give for example to the loss of a good view from a prospective building site, what weight you give that compared to, for example the high visibility of the line going through the center of a valley. I just don't really know. I don't think one of us would weigh one more heavily and one would weigh the other more heavily. I happen to be very fond of views. But, other people don't seem to give a darn about views.

How do you compare the economic advantage of a more or less straight line to the extra cost of a more [11] zig zag line with more different accesses from the roads. How much weight do you give that?

What weight do you give the extra cost of building with higher towers, with more silhouette and a higher cost against the value of having only one corridor. My conclusions on the relative weights might have been different, but, I cannot say that the plaintiff's decision in one group of factors outweigh another, it wasn't abuse of discretion.

The decision I found most compelling was the decision

of Judge Day. I happen to have known Judge Day from some work in one of the Bar Associations' Committees. I know him to be a man of great ability, a man who was very conscious of the rights of individuals. A man with a great deal of breadth, in my opinion.

The interesting thing about his decision in Cleveland Electric Illuminating versus Carl Lesher, is the fact that although he, this was a route as you know that went through a park and his decision was that he and Judge Locher had decided in the lower Court that this park unreasonably affected the welfare of the general public. That was his decision in the trial of Court and despite the fact that Day refused to upset this decision he said that Judge Locher made the decision and he was the trier of fact and he backed it up. At the same time he held that this was not, of running [12] this line through this park was not an abuse of discretion and by the Board of Directors of the Illuminating Company. In other words, he held, he said, "Without adopting an extreme definition of abuse of discretion seems to us enough to determine the issue, if the evidence shows the Board of Directors made a reasoned and good faith effort to exercise the discretion given it by the revised code."

Whether the product of that action was the best conceivable decision, or whether we, or the Court below agreed with it, or would have made a different judgment on the same evidence is beside the point.

In other words, basically the Gas and Electric Company is a lower court and as long as they don't abuse their discretion, I as a Judge in this Court don't have any right, even though I may think they made the wrong decision. I do not have the right to set aside that conclusion and that my conclusion, that the different route would have been better does not imply an abuse of discretion on their part.

So, we conclude that the plaintiffs have not abused their discretion under 163.09 (B). They are entitled to their appropriation. They have shown its necessity.

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

Nos. A-751384-86

CINCINNATI GAS & ELECTRIC COMPANY, et al.,
Plaintiffs,

vs.

EARL M. POPE, et al.,
Defendants.

ENTRY DETERMINING RIGHT TO TAKE

February 8, 1977

This cause came on to be heard on the pleadings and the evidence and the oral arguments of counsel on the issue of necessity relating to the location of the route of the proposed line and to acquire a right of way over the property of each of the defendants, the Court having heretofore determined that the defendants have failed to establish their defense that the plaintiffs had not negotiated in good faith or that the line was not necessary. On consideration of all of the evidence and the arguments of counsel, the Court finds and determines that the defendants have failed to establish that the plaintiffs have been guilty of an abuse of discretion in determining the necessity to acquire a right of way over the property of each of the defendants.

IT IS, THEREFORE, CONSIDERED, ORDERED AND ADJUDGED, that the plaintiffs are entitled to acquire a right of way over a property of each of the defendants as described in the Complaint upon the determination by a jury on the basis of the evidence to be introduced of the amount of compensation to which each of the defendants is entitled for the right of way so acquired.

IT IS FURTHER ORDERED that this case be set for trial by a jury as provided by law.

To which the defendants by their counsel hereby except.

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IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

NOS. C-77107, C-77113, C-77114

CINCINNATI GAS & ELECTRIC CO., ET AL.,
Plaintiffs-Appellees,

vs.

EARL M. POPE, ET AL.,
Defendants-Appellants.

ENTRY OF DISMISSAL

May 3, 1977

This cause came on to be heard by the Court upon the motion of the appellees for an order of this Court dismissing the appeal, the memorandum in opposition thereto, and upon the reply memorandum, and

The Court, being fully advised in the premises, finds that said motion is well taken and that the same ought to be and is hereby granted.

Wherefore it is Ordered and Decreed that the appeal is dismissed and all other pending motions are hereby overruled as being moot.

It is further Ordered that a certified copy of this judgment shall constitute the mandate to the Common Pleas Court of Hamilton County, Ohio, pursuant to Rule 27, Ohio Rules of Appellate Procedure.

THE CINCINNATI GAS & ELECTRIC COMPANY ET AL., APPELLEES, *v.* POPE ET AL., APPELLANTS.

[Cite as Cincinnati Gas & Electric Co. v. Pope (1978), 54 Ohio St. 2d 12.]

Appropriation of property—Appropriation order—Appealable, when.

A trial court's order in favor of an appropriating agency, entered pursuant to R. C. 163.09 (B), is not subject to immediate appellate review; rather, the property owner may seek appellate review only after a jury has assessed compensation and damages and the trial court enters an order, pursuant to R. C. 163.15, which disposes of the whole case. (R. C. 163.09 and 163.19 construed.)

(No. 77-695—Decided April 5, 1978.)

APPEAL from the Court of Appeals for Hamilton County.

In February 1975, Cincinnati Gas & Electric Company and The Dayton Power & Light Company (hereinafter appellees) filed petitions for appropriation, pursuant to R. C. 163.05, naming appellants, Earl and Dolores Pope, Edwin and Dolores O. Pope, and Edith Pope, as owners of three contiguous parcels of property located in western Hamilton County. By these complaints appellees sought to acquire an easement across appellants' properties, for the purpose of constructing a high-voltage electric transmission line.[1]

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[1] The three cases were consolidated for trial and have been consolidated for the purpose of appellate review by both the Court of Appeals and this court.

The cases were tried to the Court of Common Pleas of Hamilton County during several days in September 1976, and January 1977. On January 18, 1977, the trial court entered an oral opinion, finding that appellees were entitled to appropriate the easements which they sought. Subsequent to this ruling, but prior to an assessment of compensation by a jury, as provided for in R. C. 163.14,[2] appellants filed notices of appeal. Appellees filed a motion to dismiss the appeal, and on May 3, 1977, the Court of Appeals granted said motion.

The cause is now before this court pursuant to the allowance of a motion to certify the record.

Messrs. Beirne & Wirthlin, Mr. C. R. Beirne and *Mr. Michael A. Fulton,* for appellees.

Mr. Robert E. Manley, Mr. Joseph R. Jordan and *Mr. Timothy A. Fischer,* for appellants.

CELEBREZZE, J. The sole question presented for our determination is whether a Court of Appeals has jurisdiction to review a lower court's order, entered pursuant to R. C. 163.09 (B), in favor of an appropriating agency on one or more of the preliminary issues relative to appropriation, *i. e.,* the condemnor's right to make an appropriation, the inability of the owners and the condemnor to

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[2] R. C. 163.14, in pertinent part, provides as follows:

"In appropriation proceedings the jury shall be sworn to impartially assess the compensation and damages, if any, without deductions for general benefits as to the property of the owner.

"The jury, in its verdict, shall assess the compensation for the property appropriated and damages, if any, to the residue, to be paid to the owners. • • •

"The verdict shall be signed by at least three-fourths of the members of the jury.

"If a jury is discharged without rendering a verdict, another shall be impaneled at the earliest convenient time and shall make the inquiry and assessment."

agree upon monetary compensation, and the necessity for a particular appropriation.

R. C. 163.09 (B) provides as follows:

"When an answer is filed pursuant to section 163.08 of the Revised Code, and any of the matters relating to the right to make the appropriation, the inability of the parties to agree, or the necessity for the appropriation are specifically denied in the manner provided in such section, the court shall set a day, not less than five nor more than fifteen days from the date the answer was filed to hear such questions. Upon such questions, the burden of proof is upon the owner. A resolution or ordinance of the governing or controlling body, council, or board of the agency declaring the necessity for the appropriation shall be prima-facie evidence of such necessity in the absence of proof showing an abuse of discretion by the agency in determining such necessity. If as to any or all the property or other interests sought to be appropriated, the court determines the questions in favor of the agency, the court shall set a time for the assessment of compensation by the jury within twenty days from the date of the journalization of such determination. *An order of the court in favor of the agency on any of such questions or on qualification under section 163.06 of the Revised Code, shall not be a final order for purposes of appeal. An order of the court against the agency on any of such questions, or on the question of qualification under section 163.06 of the Revised Code, shall be a final order for purposes of appeal.* If a public agency has taken possession prior to such order and such order, after any appeal, is against the agency on any of such questions, the agency shall restore the property to the owner in its original condition or respond in damages, which may include the items set forth in division (B)

of section 163.21 of the Revised Code, recoverable by civil action, to which the state consents." (Emphasis added.)

The foregoing statute expresses a legislative resolution that the trial court's order in favor of the appropriating agency is not immediately appealable by the property owner, whereas the trial court's order against the agency is a final order which the agency may appeal.

Appellants contend that the General Assembly may not limit or abridge the power or the right of appellate courts to review judgments of the Court of Common Pleas, and that any such legislative attempt is unconstitutional and void. We disagree. The appellate jurisdiction of the Courts of Appeals is set forth in Section 3 (B) (2), Article IV of the Ohio Constitution, as follows:

"Courts of appeals shall have such jurisdiction *as may be provided by law* to review and affirm, modify, or reverse judgments or final orders of the courts of record inferior to the court of appeals within the district and shall have such appellate jurisdiction as may be provided by law to review and affirm, modify, or reverse final orders or actions of administrative officers or agencies." (Emphasis added.)

The above section of the Constitution was adopted on May 7, 1968, and its provisions are closely analogous to the amended version of former Section 6, Article IV of the Ohio Constitution. However, when originally enacted, Section 6 of Article IV read as follows:

"The courts of appeals shall have original jurisdiction in quo warranto, mandamus, habeas corpus, prohibition and procedendo, and appellate jurisdiction in the trial of chancery cases, and, to review, affirm, modify, or reverse the judgments of the courts of common pleas, superior courts and other courts of record within the district as may be provided by law. * * *"

On January 1, 1945, the following amendment became effective:

"The courts of appeals shall have original jurisdiction in quo warranto, mandamus, habeas corpus, prohibition and procedendo, and *such jurisdiction as may be provided by law* to review, affirm, modify, *set aside,* or reverse judgments *or final orders of boards, commissions, officers, or tribunals,* and *of* courts of record *inferior to the court of appeals* within the district, * * *." (Emphasis supplied to indicate new language.)

In *Youngstown Municipal Ry. Co.* v. *Youngstown* (1946), 147 Ohio St. 221, this court construed the then recent amendment, at page 223, as follows:

"* * * The expressed intention is to accomplish the simple result of empowering the General Assembly to change the appellate jurisdiction of the Courts of Appeals if it should desire so to do; and unless and until there is such legislative action, the appellate jurisdiction of the Courts of Appeals remains as it was at the time the amendment was adopted."

In *Klein* v. *Bendix-Westinghouse Co.* (1968), 13 Ohio St. 2d 85, decided approximately two months before Section 6, Article IV was repealed and reenacted as Section 3, Article IV, this court was presented with the question of whether a discovery order of a trial court was subject to immediate appellate review. In the course of deciding that it was not, the court, per Paul W. Brown, J., stated the following:

"The attitude of this court has long been that the definition of final orders is within the judicial province. *Hoffman* v. *Knollman,* 135 Ohio St. 170; *Price* v. *McCoy Sales & Service, Inc.,* 2 Ohio St. 2d 131. By constitutional declaration, it is within the legislative province to specify which final orders are appealable. Section 6, Article IV,

Ohio Constitution. The case of *Youngstown Municipal Ry. Co.* v. *Youngstown,* 147 Ohio St. 221, holds that all orders falling within this court's definition of final orders are appealable until the General Assembly acts to modify the jurisdiction of the Courts of Appeals."

The *Klein* court also stated that R. C. 2505.02 constituted a legislative restatement of this court's definition of a final order.

We note that R. C. 2505.02 declares that "* * * an order affecting a substantial right made in a special proceeding * * * is a final order which may be reviewed, affirmed, modified, or reversed, with or without retrial." Under the above definition a trial court's order determining the preliminary issues in favor of the appropriating agency would appear to be a final order, since the order is made in a special proceeding and it will certainly affect the owner's property rights. Nevertheless, all final orders are not *ipso facto* appealable orders, and the distinction made in *Klein* is supported by the following language in R. C. 2505.03: "Every final order, judgment or decree of a court * * * may be reviewed * * * unless otherwise provided by law * * *."

Clearly, in enacting R. C. 163.09, the General Assembly has "otherwise provided by law" that a trial court's order in favor of the appropriating agency on the preliminary questions is not immediately appealable. Rather, we believe that the statutory scheme of R. C. Chapter 163 contemplates that the property owner may obtain appellate review only after the preliminary issues are decided by the trial court, a jury assesses compensation pursuant to R. C. 163.14, and a journal entry which reflects both the decision on the preliminary issues and the amount of the jury award is made by the trial court, pursuant to R. C. 163.15. The legislative motivation for so designing condemnation proceedings is apparent, because only after a judgment is entered under R. C. 163.15 are all the rights of the parties adjudicated. The resulting consolidation of issues on appeal thus precludes piecemeal litigation, thereby fostering the conservation of judicial energy while at the same time eliminating unnecessary delays.

In our opinion R. C. 163.09 (B) indicates a legislative decision that the property owner be denied an immediate appeal on the preliminary issues relative to appropriation. Because the General Assembly has the constitutional authority to make such a decision, appellant's first argument must be rejected.

An additional argument advanced by appellants is that the operation of R. C. 163.19 renders meaningless appellate review of the trial court's decision on the preliminary issues, thereby depriving appellants of the due process of law guaranteed by the Fourteenth Amendment to the United States Constitution and Section 16, Article I of the Ohio Constitution.

R. C. 163.19 states the following:

"Subject to sections 163.07 and 163.09 of the Revised Code, any party may prosecute appeals as in other civil actions from the judgment of the court. The trial court upon proper terms may suspend the execution of any order; but in all cases where the agency pays or deposits the amount of the award assessed and gives adequate security for any further compensation and costs, as required by the court, the right to take and use the property appropriated shall not be affected by such review by the appellate courts."

The due process of law to be observed whenever private property is appropriated for public use is set forth in Section 19, Article I of the Ohio Constitution, which states, in pertinent part:

"* * * [W]here private property shall be taken for public use, a compensation therefor shall first be made in money, or first secured by a deposit of money; and such compensation shall be assessed by a jury, without deduction for benefit to any property of the owner."

R. C. Chapter 163 will not deprive the appellants of the substantive due process of law specified in the above constitutional provision. The trial court has already determined that the property will be taken for a public use, and, upon remand of this cause, a jury will be selected to assess the compensation and damages to be awarded to appellants. In addition, procedural due process is afforded within R. C. Chapter 163, since R. C. 163.07 requires that the property owner be notified that a petition for appropriation has been filed, and R. C. 163.09 assures the property owner of a due process hearing on the preliminary issues.

This court has repeatedly stated that there is no inherent right of appeal from a judgment of a court, and that such right must be conferred by Constitution or statute. *Middletown* v. *City Comm. of Middletown* (1941), 138 Ohio St. 596; *Lindblom* v. *Bd. of Tax Appeals* (1949), 151 Ohio St. 250; *In re Mahoning Valley Sanitary Dist.* (1954), 161 Ohio St. 259, certiorari denied, 348 U. S. 831.

The General Assembly has apparently decided that the health, safety and welfare of the general public will be promoted by the speedy construction of necessary public projects. R. C. 163.19 thus appears to be a compromise measure which preserves the property owner's traditional right to appellate review of the trial court's findings on the preliminary issues, but which also grants to the appropriating agency the right to take and use the appropriated property while such appellate review is pending. Accord *Ornstein* v. *Chesapeake & Ohio Ry. Co.* (1931), 123 Ohio St. 260.

We see no necessary inconsistency in the provisions of R. C. 163.19. In the majority of appeals in appropriation cases there would be no reason to delay construction of a public project when only the jury award of compensation is contested. In those rare instances where the property owner successfully appeals the preliminary issues of the right to take and the necessity for the take, the title to the property previously conferred upon the appropriating agency, under R. C. 163.15, is thereupon subject to defeasance. Finally, we recognize that because of the balance struck within R. C. 163.19 there is the possibility that the contested property might be damaged by the appropriating agency after it acquires title thereto under R. C. 163.15, only to be later restored, in this damaged condition, to the property owner who successfully appeals the preliminary issues. It is therefore imperative that the property owner who prosecutes an appeal on other than the jury award of compensation adequately inform the appellate court of his dilemma, so that the appellate court might implement the special provision of R. C. 163.22 which mandates that " [a]ll proceedings brought under sections 163.01 to 163.22, inclusive, * * * shall be advanced as a matter of immediate public interest and concern and shall be heard by the court at the earliest practicable moment."

The judgment of the Court of Appeals must be affirmed, and the cause is hereby remanded to the trial court so that compensation may be assessed.

Judgment affirmed.

O'NEILL, C. J., HERBERT, W. BROWN, P. BROWN, SWEENEY and LOCHER, JJ., concur.

STATUTES

OHIO REVISED CODE

§ 147 In enacting a statute, it is presumed that:

(A) Compliance with the constitutions of the state and of the United States is intended;

(B) The entire statute is intended to be effective;

(C) A just and reasonable result is intended;

(D) A result feasible of execution is intended.

§ 163.08 Any owner may file an answer to such petition. Such answer shall be verified as in a civil action and shall contain a general denial or specific denial of each material allegation not admitted. The agency's right to make the appropriation, the inability of the parties to agree, and the necessity for the appropriation shall be resolved by the court in favor of the agency unless such matters are specifically denied in the answer and the facts relied upon in support of such denial are set forth therein, provided, when taken in time of war or other public exigency, imperatively requiring its immediate seizure or for the purpose of making or repairing roads, which shall be open to the public, without charge, an answer may not deny the right to make the appropriation, the inability of the parties to agree, or the necessity for the appropriation. Any answer shall be filed on or before the third Saturday after the return day of the summons or service by publication as set forth in section 163.07 of the Revised Code. No extension of time for filing of an answer shall be granted.

§ 163.09 (A) If no answer is filed pursuant to section 163.08 of the Revised Code, nor approval ordered by the court to a settlement of the rights of all necessary parties,

the court on motion of a public agency shall declare the value of the property taken and the damages, if any, to be as set forth in any document properly filed with the clerk of courts by the public agency. In all other cases the court shall fix a time, within twenty days from the last date that such answer could have been filed, for the assessment of compensation by a jury.

(B) When an answer is filed pursuant to section 163.08 of the Revised Code, and any of the matters relating to the right to make the appropriation, the inability of the parties to agree, or the necessity for the appropriation are specifically denied in the manner provided in such section, the court shall set a day, not less than five nor more than fifteen days from the date the answer was filed to hear such questions. Upon such questions, the burden of proof is upon the owner. A resolution or ordinance of the governing or controlling body, council, or board of the agency declaring the necessity for the appropriation shall be prima-facie evidence of such necessity in the absence of proof showing an abuse of discretion by the agency in determining such necessity. If as to any or all the property or other interests sought to be appropriated, the court determines the questions in favor of the agency, the court shall set a time for the assessment of compensation by the jury within twenty days from the date of the journalization of such determination. An order of the court in favor of the agency on any of such questions or on qualification under section 163.06 of the Revised Code, shall not be a final order for purposes of appeal. An order of the court against the agency on any of such questions, or on the question of qualification under section 163.06 of the Revised Code, shall be a final order for purposes of appeal. If a public agency has taken possession prior to such order

and such order, after any appeal, is against the agency on any of such questions, the agency shall restore the property to the owner in its original condition or respond in damages, which may include the items set forth in division (B) of section 163.21 of the Revised Code, recoverable by civil action, to which the state consents.

(C) When an answer is filed pursuant to section 163.08 of the Revised Code, and none of the matters set forth in division (B) of this section is specifically denied, the court shall fix a time within twenty days from the date the answer was filed for the assessment of compensation by a jury.

(D) If answers are filed pursuant to divisions (B) and (C) of this section, or an answer is filed on behalf of fewer than all the named owners, the court shall set the hearing or hearings at such times as are reasonable under all the circumstances, but in no event later than twenty days after the issues are joined as to all necessary parties or twenty days after rule therefor, whichever is earlier.

(E) The court may, with the consent of the parties, order two or more cases to be consolidated and tried together, but the rights of each owner to compensation, damages, or both shall be separately determined by the jury in its verdict.

§ 163.14 In appropriation proceedings the jury shall be sworn to impartially assess the compensation and damages, if any, without deductions for general benefits as to the property of the owner.

The jury, in its verdict, shall assess the compensation for the property appropriated and damages, if any, to the residue, to be paid to the owners. When a building or other structure is on the property appropriated or when a

building or other structure is situated partly upon the land appropriated and partly upon adjoining land so that the structure cannot be divided upon the line between such lands without manifest injury thereto, the jury, in assessing compensation to any owner of the land, shall assess the value thereof, as part of the compensation. The title to said structure shall vest in the agency which shall have the right to enter upon the adjoining land upon which any part of the structure is located for the purpose of removing said structure therefrom, after deposit in accordance with the verdict. Such removal shall be made within ninety days after taking title to the property appropriated; provided, that the court may extend removal time upon such conditions as the court requires.

The verdict shall be signed by at least three-fourths of the members of the jury.

If a jury is discharged without rendering a verdict, another shall be impaneled at the earliest convenient time and shall make the inquiry and assessment.

§ 163.15 As soon as the agency pays to the party entitled thereto or deposits with the court the amount of the award and the costs assessed against the agency, it may take possession; provided, that this shall not be construed to limit the right of a public agency to enter and take possession, as provided in section 163.06 of the Revised Code. When the agency is entitled to possession the court shall enter an order to such effect upon the record and, if necessary, process shall be issued to place the agency in possession. Whenever a final journal entry in an appropriation proceeding, granting to this state a fee title or any lesser estate or interest in real property is filed and journalized by the clerk of courts, the clerk of courts shall forthwith transmit to the county auditor a certified copy of said

final journal entry who shall transfer the property on his books and transmit said entry with proper endorsement to the county recorder for recording. The costs of filing such final journal entry with the county auditor and the county recorder shall be taxed as costs in the appropriation proceedings the same as other costs are taxed under section 163.16 of the Revised Code.

§ 163.19 Subject to sections 163.07 and 163.09 of the Revised Code, any party may prosecute appeals as in other civil actions from the judgment of the court. The trial court upon proper terms may suspend the execution of any order; but in all cases where the agency pays or deposits the amount of the award assessed and gives adequate security for any further compensation and costs, as required by the court, the right to take and use the property appropriated shall not be affected by such review by the appellate courts.

MAGNA CARTA

39. Nullus liber homo capiatur, vel imprisonetur, aut dissaisiatur, aut utlagetur, aut exuletur, aut aliquo modo destruatur, nec super eum ibimus, nec super eum mittemus, nisi per legale judicium parium suorum vel per legem terrae.

[Generally accepted translation: No free man shall be taken, or imprisoned, or disseized, or outlawed, or exiled, or in any way harmed — nor will we go upon or send upon him — save by the lawful judgment of his peers or by the law of the land.]

Supreme Court, U. S.
FILED
JUL 29 1978
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

No. 78-4

EARL M. POPE, DOLORES POPE, EDWIN E. POPE, DOLORES O. POPE, EDITH POPE,

Petitioners,

v.

CINCINNATI GAS & ELECTRIC CO., DAYTON POWER & LIGHT CO.,

Respondents.

BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

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No. 78-4

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BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

QUESTION PRESENTED

Whether the provisions of Section 163.09 (B), Ohio Revised Code, stating that a determination by a trial court in favor of an appropriating agency on the preliminary question of the necessity to make the appropriation "shall not be a final order for purposes of appeal" and that the cause must proceed to an assessment of compensation prior to an appeal, is violative of due process of law.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

The following provisions of the Ohio Revised Code were not printed in the argument portion of the petitioners' brief and have been added below because of their importance to the issues raised by the petition and this brief.

Section 163.09 (B)

"When an answer is filed pursuant to section 163.08 of the Revised Code, and any of the matters relating to the right to make the appropriation, the inability of the parties to agree, or the necessity for the appropriation are specifically denied in the manner provided in such section, the court shall set a day, not less than five nor more than fifteen days from the date the answer was filed to hear such questions. Upon such questions, the burden of proof is upon the owner. A resolution or ordinance of the governing or controlling body, council, or board of the agency declaring the necessity for the appropriation shall be prima-facie evidence of such necessity in the absence of proof showing an abuse of discretion by the agency in determining such necessity. *If as to any or all the property or other interests sought to be appropriated, the court determines the questions in favor of the agency, the court shall set a time for the assessment of compensation by the jury within twenty days from the date of the journalization of such determination. An order of the court in favor of the agency on any of such questions or on qualification under section 163.06 of the Revised Code, shall not be a final order for purposes of appeal.* An order of the court against the agency on any of such questions, or on the question of qualification under section 163.06 of the Revised Code, shall be a final order for purposes of appeal. If a public agency has taken possession prior to such order and such order, after any appeal, is against the agency on any of such questions, *the agency shall restore the property to the owner in its original condition or respond in damages,* which may include the items set forth in division (B) of section 163.21 of the Revised Code, recoverable by civil action, to which the state consents." (Emphasis supplied).

Section 163.15 *When agency entitled to possession; transmission of final journal entry.*

"As soon as the agency pays to the party entitled thereto or deposits with the court the amount of the award and the costs assessed against the agency, it may take possession; provided, that this shall not be construed to limit the right of a public agency to enter and take possession, as provided in section 163.06 of the Revised Code. When the agency is entitled to possession the court shall enter an order to such effect upon the record and, if necessary, process shall be issued to place the agency in possession. Whenever a final journal entry in an appropriation proceeding, granting to this state a fee title or any lesser estate or interest in real property is filed and journalized by the clerk of courts, the clerk of courts shall forthwith transmit to the county auditor a certified copy of said final journal entry who shall transfer the property on his books and transmit said entry with proper endorsement to the county recorder for recording. The costs of filing such final journal entry with the county auditor and the county recorder shall be taxed as costs in the appropriation proceedings the same as other costs are taxed under section 163.16 of the Revised Code."

Section 163.19 *Appeal; right to use property not affected.*

"Subject to sections 163.07 and 163.09 of the Revised Code, any party may prosecute appeals as in other civil actions from the judgment of the court. The trial court upon proper terms may suspend the execution of any order; but in all cases where the agency pays or

> deposits the amount of the award assessed and *gives adequate security for any further compensation and costs, as required by the court,* the right to take and use the property appropriated shall not be affected by such review by the appellate courts." (Emphasis supplied).

See also Section 163.06, Ohio Revised Code, attached hereto as Appendix 2.

STATEMENT OF THE CASE

There are several omissions and inaccuracies contained in the petitioners' Statement of the Case.

The petitioners are in error in describing the trial court's determination of the issues presented prior to an award of compensation as a "judgment." The Ohio General Assembly obviously carefully worded Section 163.09(B), Ohio Revised Code, to avoid use of the term "judgment" under such circumstances. It is a preliminary "determination" only.

The petitioners correctly state at page 4 of their brief that almost three years elapsed between the time the instant complaints were filed and the cases were decided at trial. It is incorrectly stated at page 16, footnote 16, of the petitioners' brief, however, that,

> "The Ohio Supreme Court clearly overlooked the fact that the Respondent utility companies in this case are hardly in a position to urge that the case proceed expeditiously *inasmuch as they waited almost two years after filing the case before trying it,* despite the fact that Chapter 163 provides that such cases may be tried within fifteen days of the filing of the answer."

It was explained to the Supreme Court that at the time the complaints were filed, there were other consolidated appropriation cases which had been tried and were pending on appeal. They were *Cincinnati Gas & Electric Co., et al.* v. *John T. Nieman, et al.,* CA 74100086 and CA 74100087 (Ohio First District Court of Appeals, decided June 30, 1975), *cert. denied,* No. 75-743 (Ohio Supreme Court, October 16, 1975), *cert. denied,* No. 75-990 (United State Supreme Court, March 22, 1976). (See Opinion of Ohio First District Court of Appeals attached hereto as Appendix 1). The *Nieman* cases involved the same electric transmission line and route, and the property owners were represented by the same counsel as in the present cases. Indeed, all of the same defenses were raised in the answers in the *Nieman* cases and were ultimately decided adversely to the property owners. Thus, the present cases were intentionally delayed until after the appellate courts had had an opportunity to review the controlling questions of law presented by the *Nieman* appeals.

Finally, the petitioners failed to inform the Court that on November 25, 1977, the respondents filed a motion to dismiss the petitioners' appeal to the Ohio Supreme Court as having been improvidently allowed. The motion recited the fact that several of the case authorities relied upon in the petitioners' brief had been effectively overruled by an Amendment to Article IV, Section 6, of the Ohio Constitution which was passed by the people of Ohio and went into effect on January 1, 1945. For the first time, the Amendment gave to the Ohio General Assembly the power to determine the jurisdiction of the Court of Appeals in Ohio. *See, e.g., Youngstown Municipal Railway Co.* v. *Youngstown,* 147 Ohio St. 221 (1946). The petitioners' brief had relied upon cases decided prior to the Amendment which were no longer applicable to argue that it had

no such power. The motion to dismiss became moot, however, when the appeal was decided on the merits favorably to the respondents.

FACTS

The petitioners have incorrectly represented to the Court at page 7 of their brief that construction of the respondents' transmission line towers on the petitioners' property will cause "irreversible damage to a fragile hillside." This claim is directly controverted by the findings contained in the opinion of the Common Pleas Court, wherein the Court said:

> "Now, in the construction of these bases for these towers * * * I think the evidence shows [that] once you have placed your concrete in there and restore the slope to its natural slope [there is] no reason at all why it shouldn't be as non-slippable as it was before it went in and, it would certainly create less of a slippage problem than the road going up the hill, which has to stay by its very nature, has to remain in the cut and fill condition." See petitioners' appendix, page 7a.

As the trial court observed, the petitioners had constructed a road on the hillside in question, resulting in a very real problem of slippage of the hillside which will not be caused by the transmission line towers. These facts directly contradict petitioners' representation that construction of the towers will cause "irreversible damage to a fragile hillside."

REASONS TO DENY WRIT

A threshold reason for denial of the writ, which the petitioners' brief completely ignores, is that this appeal was brought before the trial court had had an opportunity to adjudicate all of the matters to be determined prior to a final judgment; namely, assessment of compensation.

The 1944 Amendment to Article IV, Section 6, of the Ohio Constitution gave the Legislature the power to define the jurisdiction of the Courts of Appeals by providing that, "The courts of appeals shall have * * * such jurisdiction *as may be provided by law* to review, affirm, modify, set aside or reverse judgments * * *." In 1968, the Ohio Constitution was again amended, and retained the same provision as part of Article IV, Section 3 (B) (2). The Legislature thus exercised its constitutionally conferred powers by stating in Section 163.09, Ohio Revised Code, that an order issued prior to an award of compensation "shall not be a final order for purposes of appeal." In the face thereof, there is no overriding federal constitutional principle of which the respondents are aware which precludes a state legislature from requiring by statute that all matters in controversy be presented and decided at trial before an appeal can be taken.

Furthermore, the evidence presented in the trial court did not involve a challenge to the respondents' "right to take" as suggested by the petitioners. Instead, their evidence went entirely to the question of whether the respondents committed an abuse of discretion in determining the *necessity to build the line* on the petitioners' property. More specifically, the petitioners contended at trial and will later argue on appeal that there is no need for the line and that it should be moved off of their property and onto their neighbors' property. Under Section 163.09, this

"necessity" issue is entirely separate and apart from the question of whether the respondents have the *right to make the appropriation.*

Certainly, the question which the petitioners want to raise of whether the improvement should be placed on someone else's property is not one which the courts have looked upon with favor. As stated by the United States Sixth Circuit Court of Appeals in a case involving construction of a new highway in the State of Tennessee:

> "It would be virtually impossible to select a route for an interstate highway through a congested metropolitan area without working hardships upon many citizens. Appellants suggest possible alternative routes which they contend would avoid the unfortunate economic consequences which the proposed route will impose upon the North Nashville area. Alternative routes undoubtedly would impose hardships upon others. The minimizing of hardships and adverse economic effects is a problem addressing itself to engineers, not judges. The providing of just compensation to property owners falls within the purview of the laws of eminent domain." *Nashville I-40 Steering Committee* v. *Ellington,* 387 F.2d 179, 185 (6th Cir. 1967), *cert. denied,* 390 U.S. 921 (1968).

Moreover, the facts in the instant cases do not present the question whether construction of the transmission line prior to exhaustion of appeals is prejudicial to the rights of the property owners and violative of constitutional rights. The proposed route for the line was specifically designed to avoid removal of buildings or other structures on the properties affected. Actually, the properties in question are not the residences of the petitioners, but consist of vacant land purchased and held for purposes of investment. If the line were to be constructed prior to exhaustion of appeals and an appellate court were subsequently to order

that it be moved to a neighbor's property, the towers couid be pulled out of the ground and the petitioners' property could be restored to its former condition without any permanent damage. This situation is, therefore, not at all comparable to one which might involve the demolition of structures in order to construct the improvements.

THE OHIO EMINENT DOMAIN STATUTES

The Ohio statutes governing the procedures for appropriation of property are only peculiar to Ohio. They are a product of a long history of development and refinement of the Ohio law which culminated in 1966 with the enactment of Chapter 163, Ohio Revised Code. Some of the overriding objectives of the Ohio General Assembly in reorganizing the appropriation statutes in 1966 were summarized shortly after the statutes went into effect as follows:

> "At the time of the enactment of the Uniform [Eminent Domain] Act there were fourteen separate, distinct and complete procedures by which eminent domain could be exercised, making it difficult for landowners and appropriating agencies to know whether they were following the correct procedure. *Litigation over procedural technicalities was excessive. The number and variety hindered the evaluation of the procedures and encouraged their misuse. For these reasons the Ohio Legislative Service Commission and the Eminent Domain Committee of the Ohio Bar Association recognized the need for a uniform procedure which could be used whenever eminent domain was exercised. Furthermore, sentiment for reform was created by outdated procedures which produced bottlenecks in important public projects and which levied undue hardships on land owners. The recognition of the need for uniformity and reform culminated in the enactment of Ohio's Uniform Eminent Domain Act.* Whether the act permits the courts to perform properly their functions of ensuring just compensation

and administering transfer of title and possession is yet to be determined.

"Since the fairness and efficiency of Ohio's Uniform Act are determined by balancing the competing interests of landowners and appropriating agencies, it is important that these interests be understood. If either party is able to use the proceeding as a club to coerce an unjust settlement, the purpose of the proceeding is defeated. Likewise, neither party should be afforded an unfair advantage in presenting its case to the jury. *The appropriation agency is interested in immediate possession of the property so that it can begin improving and using the property without the delay caused by litigation.* Owners, on the other hand, want adequate time to relocate. The agency seeks to minimize the cost of appropriation, while the landowner generally feels that the agency's offers are wholly inadequate. The task confronting the draftsmen of the Ohio act was to blend these competing interests into a fair and efficient proceeding." (Emphasis supplied). Note, *Ohio's Uniform Eminent Domain Act: Transfer of Title and Possession*, 27 Ohio St. L. J. 525, 527-28 (1966).

Thus, the Legislature sought to avoid the frustration or defeat or long delay of public projects which can often be caused by years of litigation. These cases are, in fact, a prime example of the evils occasioned by procedural delay. The transmission line in question was originally planned in 1970 for construction in 1975. It is needed to serve two new electrical generating units which cost a total of approximately $250,000,000.00 to build and install. The efforts of the petitioners' counsel, however, have now resulted in over four years of delay in order to litigate procedural issues similar to the ones presented on this appeal. These delays have obviously come at a considerable cost to the respondents and have resulted in a continuing denial to the general public of essential benefits and services which the proposed transmission line will bring to an area in southwest Ohio which is in the process of considerable residential, commercial and industrial development.

In fact, the petitioners are complaining of a procedure which guarantees a due process hearing and a jury award of compensation prior to the time that possession of their property vests in the respondent. Actually, under Section 163.06, Ohio Revised Code, a *public* agency (such as the state, a county or municipality — as distinguished from a utility) is entitled to possession of unimproved property *prior* to a hearing and *prior* to a jury award simply by filing a petition and depositing into a Court of Common Pleas an amount equal to the estimated value of the take. This procedure, which was not used in these cases, is obviously far more restrictive of the rights of the property owners than that provided by Sections 163.09 (B), 163.15 and 163.19, Ohio Revised Code, for agencies such as the respondent utilities in the present case. If the Section 163.06 procedure passes constitutional muster, which it does, as shown below, then the procedure under attack in these cases is unquestionably valid, and there is no reason for review of it by this Court.

COMPLIANCE WITH DUE PROCESS

Nowhere in the petitioners' brief do they cite any cases which provide direct support for the proposition they assert. Their argument consists entirely of a philosophical discussion of general principles of law which have little or nothing to do with the facts and law relevant to the present case.

The probable reason the petitioners have come up empty in their search for supporting authorities is that the validity of statutes authorizing immediate possession of property by appropriating agencies is well established. *See* P.

Nichols, *The Law of Eminent Domain,* Section 27.25 (rev. 3rd ed. 1976) (and the authorities cited therein). The law is clear that so long as compensation is paid to the owner, the constitutional requirements are fulfilled. *Id.* Section 8.71; *see* Article I, Section 19, Ohio Constitution. This principle applies to private corporations as well as to public agencies. P. Nichols, *The Law of Eminent Domain, supra,* at Section 8.712.

Under 40 U.S.C. Section 258(a) (1931), the Federal Government has long had the power to issue a declaration of taking which, when filed in a District Court together with a deposit of the estimated compensation, operates immediately to vest title to the property in the United States of America. The only right given to the property owner is that of just compensation with interest. Most, if not all, state jurisdictions provide for a similar "quick take" procedure. *See* P. Nichols, *The Law of Eminent Domain, supra,* at Sections 8.71, 8.712-8.713. The following discussion of the constitutionality of Section 258(a) is representative of the views of courts everywhere on this issue:

> "This argument in effect questions the constitutionality of the Declaration of Taking Act, which provides that the Government takes title to property immediately upon the filing of the declaration and the payment into court of the estimated value of the property taken. Long before the passage of the Declaration of Taking Act, the Supreme Court held that the Fourteenth Amendment is not violated by the provision of a state condemnation law authorizing the taking of possession prior to the final determination of the amount of compensation and the payment thereof, if adequate provision is made for compensation. *Backus* v. *Fort Street Union Depot Co.,* 1898, 169 U.S. 557, 18 S.Ct. 445, 42 L.Ed. 853. The provision in the Declaration of Taking Act for the payment into court of the estimated value of the property sought to be

> condemned, and the provision that if just compensation as finally determined exceeds the amount deposited in court, judgment shall be entered against the United States for the deficiency at six percent interest from the date of the taking, have been held to be adequate provision for compensation. *City of Oakland* v. *United States,* 9 Cir., 1942, 124 F.2d 959, certiorari denied, 1942, 316 U.S. 679, 62 S.Ct., 1106, 86 L.Ed. 1753. Furthermore, unlike the type of condemnation in the Barnidge case, further protection is afforded property owners by the provision that the Government cannot abandon a condemnation under the Declaration of Taking Act, but must carry it through to completion, including the payment in full of the compensation ultimately awarded. *Catlin* v. *United States,* 1945, 324 U.S. 229, 241, 242, 65 S.Ct. 631, 89 L.Ed. 911; 40 U.S.C.A. Sections 258c and 258e. I must therefore hold that the defendants' contentions going to the constitutionality of a Declaration of Taking Act condemnation have already been raised and decided adversely to them in the foregoing cases, which I regard as controlling here." *United States* v. *40.75 Acres of Land,* 76 F. Supp 239, 243 (N.D. Ill. 1948).

The respondents rely upon *40.75 Acres of Land* and the authorities cited in the above passage as controlling precedent which is fully dispositive of the issues raised by the petitioners. *See also Travis* v. *United States,* 287 F.2d 916, 919 (Ct. Cl. 1961), *cert. denied,* 368 U.S. 824 (1961); and *City of Oakland* v. *United States,* 124 F.2d 959 (9th Cir. 1942), *cert. denied,* 316 U.S. 679 (1942). As noted above at page 3, Section 163.19 provides:

> "The trial court upon proper terms may suspend the execution of any order; but in all cases where the agency pays or deposits the amount of the award assessed and gives adequate security for any further compensation and costs, as required by the court, the

right to take and use the property appropriated shall not be affected by such review by the appellate courts."

The petitioners have injected an equal protection argument into their brief in citing and quoting from *Griffin* v. *Illinois,* 351 U.S. 12 (1956). See petitioners' brief, p. 14. Their argument under *Griffin,* however, should be rejected out of hand because the issue presented in their petition invokes only the guarantees of the due process provision and not the equal protection provision of the Fourteenth Amendment of the United States Constitution.

In any event, *Griffin* v. *Illinois, supra,* involves state discrimination against indigent criminal defendants who cannot afford an appeal vis-a-vis other criminal defendants who are able to afford an appeal. This is a totally inapposite situation to the facts of the present case. It is only when a classification of persons under state law cannot be supported on any rational basis, as in *Griffin,* that this Court has found violation of the equal protection clause. *Compare Griffin with Massachusetts Bd. of Retirement* v. *Murgia,* 427 U.S. 307 (1976); *Mitchell* v. *W. T. Grant Co.,* 416 U.S. 600 (1974); *McGinnis* v. *Royster,* 410 U.S. 263 (1973); *Ortwein* v. *Schwab,* 410 U.S. 656 (1973); *United States* v. *Kras,* 409 U.S. 434 (1973); *Allied Stores of Ohio, Inc.* v. *Bowers,* 358 U.S. 522 (1959). Here, there is a rational basis for the procedures employed and all property owners in Ohio are given equal treatment under the law. The petitioners' argument is completely devoid of substance.

CONCLUSION

There is no plausible reason why this Court should grant the petition for writ of certiorari. The Ohio procedure for appropriation of property under review goes far beyond the long recognized due process requirements applicable to appropriation procedures. Contrary to the petitioners' assertion, the facts as found by the trial court do not justify the assertion that the construction of the towers on petitioners' property will cause "irreversible damage to a fragile hillside." In addition, the provisions of the Ohio statute adequately provide for the assurance of further compensation and costs if justified by the facts. For all of the foregoing reasons, it is respectfully submitted that the petition for the writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX 1

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
BUTLER COUNTY, OHIO

THE CINCINNATI GAS AND ELECTRIC COMPANY, ET AL.,
Plaintiffs-Appellants-Cross-Appellees,
v.
JOSEPH N. DAVIES, ET AL.,
Defendants-Appellees-Cross-Appellants.

NO. CA 74-10-0086
OPINION
(Filed June 30, 1975)

THE CINCINNATI GAS AND ELECTRIC COMPANY, ET AL.,
Plaintiffs-Appellants-Cross-Appellees,
v.
JOHN T. NIEMAN, ET AL.,
Defendants-Appellees-Cross-Appellants.

NO. CA 74-10-0087
OPINION
(Filed June 30, 1975)

APPEAL ON QUESTIONS OF LAW
FROM COURT OF COMMON PLEAS
BUTLER COUNTY, OHIO

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Mr. Kenneth Heuck, Jr., 2303 Central Trust Tower, Cincinnati, Ohio 45202, for Intervenors.

BY THE COURT.

The Cincinnati Gas and Electric Company and Dayton Power and Light Company sought to appropriate easements over lands of Davies and Nieman by separate actions under Section 163 et seq. of the Revised Code. The respective defendants filed their answers timely and denied that the parties had been unable to agree as to compensation, denied the necessity of the appropriation and specifically alleged many other reasons why the appropriation should be disallowed. The two actions were consolidated for purpose of trial. The defendants challenged the necessity of the appropriation and after several days of trial the court denied the right of Cincinnati Gas and Electric Company and Dayton Power and Light Company to make the appropriation. Cincinnati Gas and Electric Company and Dayton Power and Light Company will hereinafter be referred to as the Agencies and the defendants as the owners. It is from this judgment that the Agencies appeal to this Court.

The Agency, Cincinnati Gas and Electric Company, was the owner of the Miami Fort Power station, located at the junction of the Ohio and Great Miami Rivers. It entered into an agreement to build two new generating units at this

station with the Agency, Dayton Power and Light Company, and to construct a new transmission line from the new units to the Dayton area. The sole responsibility for constructing this line as far as the Village of Seven Mile was upon the Agency, Cincinnati Gas and Electric Company. Beyond Seven Mile the responsibility was that of Dayton Power and Light Company. The properties of the defendants in these proceedings was on that part of the line that the Agency, Cincinnati Gas and Electric Company, was responsible for constructing.

The court rendered its opinion which was styled a Judgment. Four days later the court approved a Supplemental Judgment Entry, the effect of which was to deny the appropriation in these two cases.

In addition, defendants have filed cross-appeals claiming that Chapter 163 is unconstitutional.

There is also an appeal by Jennings E. Stiles and Dorothy Stiles, who claim some interest in the proceedings as an adjacent property owner. These parties sought leave to intervene in these cases and their motion was overruled by the trial court.

* * *

The judgment in this case is composed of two separate entries. The first is in the form of an opinion by the trial court. Four days later, a second entry was placed upon the Journal. It is styled "Supplemental Judgment Entry."

In the opinion entry the court found that defendants did not carry their burden of proof that the safety and welfare of humans and animals was in jeopardy. The court found that plaintiffs had considered aesthetic matters as they related to structure design, shrub and tree maintenance. The court found that underground installation would be too costly and out of the question. The court

also found that plaintiffs did look at several vastly different transmission corridors, including the underground approach.

Thereafter, the court found that although the line was necessary, there was no necessity for it on the route laid out by plaintiffs. In fact, it stated that the line was inevitable and "when the Agency does it right – they have the right to the line – it is for the welfare of the people and the private land must be made subservient to that end." The court then stated that the plaintiffs abused their discretion in not having the Environmental Impact Study made and submitted to the Board of Directors prior to the decision to appropriate plaintiffs' property. The court also found that the Agencies did not take into account the interests of the public when they laid out the transmission line corridor.

These findings and judgment of the court were incorporated in a Supplemental Judgment Entry four days later which also declared Chapter 163 R. C. to be constitutional.

Appellant Agencies have filed herein their assignments of error as follows:

ASSIGNMENT OF ERROR NO. 1. The trial court erred in ruling that the Cincinnati Gas and Electric Company and the Dayton Power and Light Company were guilty of bad faith and an abuse of discretion in determining the necessity for the acquisition of easements over the properties of each of the two owners in the present action.

ASSIGNMENT OF ERROR NO. 2. The trial court erred in ruling that the Cincinnati Gas and Electric Company was guilty of bad faith and an abuse of discretion when the utility adopted changes in the specific route for the Miami Fort to Seven Mile Transmission Line, without first seeking the approval of its Board of Directors to make such changes, even though the changes in no way affected the location of the easements sought over the properties of each of the two owners in the present action.

ASSIGNMENT OF ERROR NO. 3. The trial court erred in ruling that the Cincinnati Gas and Electric Company was guilty of bad faith and an abuse of discretion in not submitting an environmental report prepared by an outside consulting firm to its Board of Directors, when the report was requested only to supplement the utility's own extensive environmental study and did not affect the resolution to take the property of each of the two owners in the present action.

ASSIGNMENT OR ERROR NO. 3-A. The trial court erred in ruling that at the time the Cincinnati Gas and Electric Company determined the specific route of the proposed transmission line, it did not have the benefit of the study of the outside environmental consulting firm.

ASSIGNMENT OF ERROR NO. 4. The ruling of the trial court that the interests of the people who were affected by the proposed transmission line were not considered by the Cincinnati Gas and Electric Company in its determination of the specific route for the proposed transmission line is completely without support in the record and is therefore contrary to the manifest weight of the evidence.

1. Article I § 19 of the Constitution of Ohio provides that –

> "Private property shall ever be held inviolate but subservient to the public welfare . . ."

The General Assembly has established the public policy that electric utility companies may exercise the power

of eminent domain for the public welfare as provided in R. C. § 4933.15. Such section provides that "The right of appropriation shall be exercised in the same manner provided by section 163.01 to 163.22, inclusive, of the Revised Code."

Section 163.09 R. C. provides that only three issues may be made by answer of the owners – (1) The right to make the appropriation; (2) The inability of the parties to agree; and (3) The necessity of the appropriation. The burden of proof is upon the owners and the resolutions of necessity by the respective boards are prima facie evidence of necessity in the absence of an abuse of discretion by the Agency.

> "In a proceeding by a private corporation to appropriate an easement for the construction of an electric transmission line, the necessity of the appropriation which the corporation is required to prove, is a reasonable necessity rather than an absolute necessity."
>
> *The Ohio Edison Co.* v. *Gantz,*
> 109 Ohio App. 127 (1958).

The *Gantz* case was decided prior to effective date of Chapter 163 R. C. when the burden of proof of necessity was on the corporation, but the quality and character of the term "necessity" has not changed.

> *Giesy* v. *Cincinnati, Wilmington and Zanesville Rd. Co.,* 4 Ohio St. 308, 327.
>
> 19A Ohio Jur. 2d p. 172 § 74.
> 29A C. J. C. 373, 374, § 90.

Where two lines for an electric transmission line are possible it is discretionary with the appropriating agency to select the route it will follow, and in the absence of

fraud, bad faith or gross abuse of discretion, such determinations will not be disturbed by the court.

> *The Ohio Edison Co.* v. *Gantz,* supra.
> *Jones* v. *Village of Maumee,* 20 Ohio App. 455,
> *Cleveland and Pittsburg Rd. Co.* v. *East Liverpool,* 51 W. L. B. 599,
> *Cotabish* v. *Cleveland Electric Illuminating Company* 28 Ohio App. 198.

This appears to be consistent with the general rule.

> ". . . In the absence of legislative restriction, the delegation of the power of eminent domain gives the grantee of the power the right to determine the location and route of the improvement and of the land to be taken for it and such determination will not be interfered with by the courts if it is made in good faith and is not capricious or wantonly injurious, or in some respects beyond the privilege conferred by the charter or statute. Evidence that another route is feasible is not sufficient to show that the grantee's selection constitutes bad faith, oppression or abuse of power.
>
> The landowner cannot raise the objection that there is no necessity for condemning his property because some other location might be made, or some other property obtained which would be more suitable."
>
> 29A C. J. S. 376-378 § 91.
>
> "The landowner's objection that some other site would serve just as well is not sustained by the courts for the reason that every other property owner could make the same objection, and if such objection has merit, then the project could never be built and the effect of the eminent domain statute becomes nugatory."
>
> Jahr, *Eminent Domain, Sections* 32, 51.

A recent case of interest is *Board of Education* v. *Holding Corp. of Ohio,* 29 Ohio App. 2d 114 (1971). There the Columbus Board of Education attempted to appropriate land for school purposes and the trial court denied such right. Apparently the court was influenced by the fact there was no ingress or egress to the property and the Board would not make immediate use of the same. The Court of Appeals reversed because it found no fraud, bad faith or abuse of discretion on the part of the school board.

The case of *Ohio Power Company* v. *Diller,* 18 Ohio App. (2) p. 167, has similar facts to the instant case. Ohio Power Company sought to appropriate lands of Diller for use as a transmission corridor. Defendant landowner appealed and the Court of Appeals affirmed, finding that the owners had not shown an abuse of discretion.

It should be kept in mind that we are here dealing with two statutory actions consolidated for trial. They are based on the eminent domain statute. They are not equity cases where broad equitable relief may be requested and granted. They do not constitute class actions. They deal only with two parcels of land out of a possible hundred or more parcels along the line. What the situation may be ten miles down or up the line from the parcels of these two owners is hardly cause for finding an abuse of discretion by the Agencies as to the defendants' land. As far as the court can determine from the record there is nothing to justify the trial court's finding of an abuse of discretion in routing the line over these two parcels.

The trial court emphasized that about sixty-percent of the line was changed from the original. Much of this was to meet the objections of the property owners involved. Had the Agencies remained adamant and refused to make changes where possible they no doubt would have been

severely criticized for not listening to the landowners and such intransigence would have been used to show the Agencies' lack of concern for the owners. We do not feel that this affected the defendants because the route was not changed over their property after the cases were filed.

The trial court in its opinion strayed far afield when it was pointed out that with all the changes it would still be necessary to cross defendants' land; and the trial court drew a parallel with the Criminal Search and Seizure law and said that this would prevent crossing defendants' land as Fruit of the poisoned tree. We fail to see the application of this reference to these cases. Accordingly, assignment of error number one is sustained.

2. Nor does this Court believe that the officers and management of the corporation owed a duty to the landowers to consult with the Board of Directors as to these changes. The trial court found that the Board had admitted that the details of the route was left to management's discretion. The right of the Directors to delegate authority to subordinate officers and agents in order to carry on the day-to-day functioning of the corporation is beyond question.

> 12 O Jur (2d) 508 § 404, p. 579 § 471.

We know of no reason why this rule should be otherwise in these cases. In fact, the top officers of management were also Directors of the Agencies and as such knew that changes in the route were being made.

> "When a petition for condemnation has been filed on behalf of a corporation by its executive officers, the owner of land sought to be taken cannot raise the objection that the directors of the corporation had not voted to authorize the filing of the petition."

See *Indiana and Michigan Electric Company* v. *Miller*, 19 Michigan App. 16, 172 N. W. 2d 223, 230-231 (1969), which quoted the above passage as authority.

It is also interesting to note that Section 163.05 (B) Ohio Revised Code, provides in part as follows:

> "Section 163.05 Petition for Appropriation.
> An agency . . . may commence proceedings in a proper court by filing a petition for appropriation of each parcel or contiguous parcels in a single common ownership, or interest or right therein. The petition of a private agency shall be verified as in a civil action and all petitions shall contain:
>
> '(B) In the case of a private agency, a statement that such appropriation is necessary, and, in the case of a public agency, a copy of the resolution of the public agency to appropriate;'."

It does not require a resolution of the Board of Directors, but only a plain statement that the appropriation is necessary. Accordingly, assignment of error number two is sustained.

3. We come now to the question whether the Agencies were guilty of bad faith and abuse of discretion in not submitting an environmental report to its Board of Directors. This report, commissioned to an independent consulting firm in January, 1974, and delivered to the Agencies at about the time of trial, was not submitted to the Board of Directors, but its executive officers had knowledge of its recommendations before the trial and adopted many of them. Again, we say that failure to obtain approval of the Board of Directors is not fatal and does not constitute either bad faith or an abuse of discretion. Accordingly, assignment of error number three is sustained.

3A. Exception is taken to the court's finding that the Environmental Study should have been made before the route was planned and that the Directors should have had such report before them at that time. There has been in recent years an awakening of our concern for the environment. Both Congress and the Ohio General Assembly have taken steps to protect the environment. Ohio adopted a Power Siting Act effective October 23, 1972, with respect to Utilities but provided for a two year grace period running to October 23, 1974. In other words, the Act did not apply to control Utilities construction commenced prior to October 23, 1974. See R. C. 4906.05.

Nevertheless, the Agencies owe a duty to defendant landowners to give serious consideration to the effect of this line on the properties of defendants. No doubt, it would have been wise if they had ordered the consultants report before they planned the line. It doesn't follow however, that the failure to do so constituted bad faith or abuse of discretion. The record shows they made their own studies of the effect on the environment and that as they received recommendations from time to time while the outside study was being made, they gave consideration to such recommendations. It seems fair to observe at this point that no matter where this line is routed, the environment will suffer and some landowner will feel aggrieved. Again, it is a question of balancing the public need for electric service against such damage. Accordingly, assignment of error three-A is sustained.

4. Appellants claim the court was in error in holding that the Agencies gave no consideration to the interests of people affected by the proposed line and that such holding is against the manifest weight of the evidence. The record shows that after the initial survey of the route, the Companies contacted defendants and other affected

owners. They explained the purpose of the line and where it would pass over defendants' property – and the line was moved to another part of the Nieman property. There was even a meeting with citizens of the area as early as May, 1973, to discuss the line, at which meeting brochures explaining the need for the line were distributed. Federal guidelines of the Department of Interior and Department of Agriculture were considered and followed where possible. There was nothing in the law at the time that required public hearings or newspaper notice of the contemplated construction. Chapter 163 R. C. and specifically § 163.09 does not require public notice or public hearings. Perhaps, the questions involving environment will never again occur in future constructions because of the requirements of the Power Siting Act. But, as to these particular cases we do not believe the failure of the Agencies to have before them the Environmental report constituted either an abuse of discretion or bad faith.

We do not find anything sinister on the part of the Agencies, in the court's reference to "the deep dark secret rooms of the drafting department" nor can we equate the conduct of the Agencies in planning this line, with Watergate. We find from the record that the appellants made every reasonable effort to inform the defendants and were unsuccessful in their negotiations with defendants and that the judgment of the court to the contrary is manifestly against the weight of the evidence.

Abuse of discretion has been defined as implying not merely an error of judgment, but perversity of will, passion, prejudice, partiality or moral delinquency.

Alliance v. *Joyce*, 49 Ohio St. 7, 22.

Bad faith has been defined as importing a dishonest purpose, moral obliguity, conscious wrongdoing, breach of a

known duty through some ulterior motive or ill will partaking of the nature of fraud. It also embraces actual intent to mislead or deceive another.

Slater v. *Motorists Mutual Ins. Co.*, 174 Ohio St. 148.

We find that the record does not sustain a finding that the Agencies were guilty of bad faith or abuse of discretion.

We accordingly find the trial court was in error in finding that the Agencies abused their discretion and acted in bad faith. Assignment of error number four is sustained.

Although the defendants prevailed in the trial court, they have filed their cross-appeals contending that Chapter 163 R. C. is unconstitutional. The trial court judgment found that Chapter 163 R. C. was constitutional. Defendants-appelles have filed six assignments of error, which are:

I. Chapter 163 of the Ohio Revised Code is an unconstitutional attempt of the Ohio Legislature to repeal the law of the land as it pertains to appropriation proceedings and purports to establish a procedure whereby private property may be appropriated without providing the due process of law to the property owner.

II. The provisions of Chapter 163, Ohio Revised Code, violate the most elemental notions of what constitutes due process in an appropriation of private property context.

III. The Court of Common Pleas erred in ruling that the defendants were not entitled to adequately prepare their case in accordance with the discovery provisions of the Ohio Rules of Civil Procedure.

IV. The failure of the Court of Common Pleas to rule upon the defendants' motions pertaining to discovery constituted a denial to the defendants of the

due process of the law and deprived them of an opportunity to adequately prepare and present their case on the merits.

V. The ruling by the Court of Common Pleas setting a trial date of August 29, 1974, constituted an unconstitutional deprivation of due process and prohibited the defendants from adequately preparing their case.

VI. The provisions of § 163.09, Ohio Revised Code, unconstitutionally placed upon these defendants the burden of proving the negative of a proposition, concerning which all of the relevant facts were in the possession of the plaintiffs.

Appellants contend that this is an improper cross-appeal; that it is an attempt to appeal from a finding and not a judgment; and that the appellee was the prevailing party and consequently suffered no prejudicial error.

Appellees raised this constitutional question in the trial court and, if denied their cross-appeal, it would mean that they would have no way of continuing to urge the unconstitutionality of Chapter 163. If it is unconstitutional, then the entire proceeding in these cases fails and there would be no right to take these properties at all. We believe we should entertain such cross-appeal and deal with the issues raised therein.

Assignments I and II are related and will be considered together. They claim Chapter 163 R. C. denies due process of law under the Federal and State Constitutions.

"Generally speaking, the guaranty of due process of law was designed as security against arbitrary action, its purpose being to exclude arbitrary power from every branch of the government. Arbitrary action constitutes a denial of due process, and in certain proceedings such action may be the only basis for a claim of denial of due process."

11 O Jur 2d 48 § 696; 19A O Jur 2d p. 83 § 8; 19A O Jur 2d p. 390 § 242.

"The fundamental requirement of due process of law is an opportunity to be heard upon such notice and proceedings as are adequate to safeguard the right for which constitutional protection is involved."

Anderson National Bank v. *Luckett,* 321 U.S. 233.

Pursuant to Art I § 19, and to provide a procedure for the exercise of the power of eminent domain, the General Assembly enacted the Uniform Eminent Domain Act, being Chapter 163 R. C. Defendants complain that the procedure as set up in Chapter 163 does not give them sufficient time to prepare their case and therefore denies them due process. A similar claim was made with respect to § 163.08 that the 30 day limit on filing an answer was too restrictive and denied them a jury trial, in the case of *City of Cincinnati* v. *The Bossert Machine Co.,* 16 Ohio St. 2d 76. The Supreme Court in that case held § 163.08 and 163.09 to be constitutional.

The court in *Ohio Power Co.* v. *Diller,* supra, considered R. C. § 163.09 with respect to placing the burden of proof on the landowner, and declared it to be constitutional. With respect to the timetable for preparation and trial of appropriation cases, who is to say what is a reasonable time to prepare and try the case? That duty falls on the General Assembly. In these cases we hold that defendants had an opportunity to be heard and that the proceedings were adequate to safeguard their rights. There was no violation of defendants' due process rights. Assignments I and II are overruled.

Assignments III and IV claim the court erred in its ruling that defendants were not entitled to discovery under the Rules of Civil Procedure and that the failure of the court to rule on their discovery motions denied them due process of law. We sustain the action of the trial court in holding that Rule I (C) of the Rules of Civil Procedure excepts appropriation cases from its operation, and in holding that R. C. § 163.10 limits the deposing of witnesses on cross-examination to officers, employees, or agents of the Agency. This does not include Directors. It should be noted, however, that the top three operating officers of each Company, who were also directors, were deposed. This is a procedural matter, established by the legislature and discovery gives rise to no constitutional question. The failure of the court to rule on subsequent motions for discovery amounted to a denial of the motions, but under the circumstances we find no denial of due process and Assignments III and IV are denied.

Assignment of Error No. V is a restatement and enlargement of the first four assignments. Specifically it complains that the trial date of August 29, 1974, did not give defendants enough time to prepare their case. R. C. § 163.09 provides that the hearing on the question of necessity shall be held no less than five nor more than fifteen days after filing of an answer. In these cases the court set the trial date on August 29, which was 72 days after filing the cases. The record in the cases is quite extensive, including many depositions taken by defendants. It reflects diligence in preparation on both sides. Again, we say this timetable is legislative. We do not find it amounts to a violation of defendants' due process rights. Assignment of Error No. V is overruled.

In defendants' final Assignment of Error No. VI, it is claimed that placing the burden on the property owners

to prove lack of necessity for the line, was unconstitutional. Prior to the passage of Chapter 163 the burden was on the corporation to prove necessity.

"The General Assembly of this state has authority to prescribe the circumstances that shall constitute prima facie evidence of a fact in issue in an action on trial in the courts of this state, whether the cause of action to which it relates arose within or without the territorial limits of the state."

The Pennsylvania Co. v. *McCann*
54 Ohio St. 10

Ohio Power Co. v. *Diller*
18 Ohio App. 2d 167

We see no constitutional violation of defendants' rights and Assignment VI is overruled.

We find that the record does n sustain a finding that the Agencies were guilty of bad faith or of abuse of discretion in their actions in laying out and attempting to construct the transmission line across the property of the parties defendant. We accordingly hold that the trial court was in error in finding that the Agencies abused their discretion and acted in bad faith. Accordingly, we reverse the action of the trial court and remand these cases to the Court of Common Pleas of Butler County, Ohio, for further proceedings not inconsistent with this Opinion.

BUZZARD, P. J., CRAWFORD and STRAUSBAUGH, J. J.

BUZZARD, P. J., AND CRAWFORD, J., RETIRED, AND ASSIGNED TO ACTIVE DUTY UNDER AUTHORITY OF SECTION 6 (C), ARTICLE IV, CONSTITUTION.

STRAUSBAUGH, J., OF THE TENTH APPELLATE DISTRICT SITTING BY ASSIGNMENT IN THE FIRST APPELLATE DISTRICT OF OHIO.

PLEASE NOTE:

The Court has placed of record its own entry in this case on the date of the release of this Opinion.

APPENDIX 2

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§ 163.06 *Deposit with court; appraisal of structures.*

(A) A public agency, other than an agency appropriating property for the purposes described in division (B) of this section, which qualifies pursuant to Section 19 of Article I, Ohio Constitution, may deposit with the court at the time of filing the petition the value of such property appropriated together with the damages, if any, to the residue, as determined by the public agency, and thereupon take possession of and enter upon the property appropriated. The right of possession upon deposit as provided in this division shall not extend to structures.

(B) A public agency appropriating property for the purpose of making or repairing roads which shall be open to the public, without charge, may deposit with the court at the time of filing the petition the value of such property appropriated together with the damages, if any, to the residue, as determined by the public agency, and stated in an attached declaration of intention to obtain possession and thereupon take possession of and enter upon the property appropriated, including structures situated upon the land appropriated for such purpose or situated partly upon the land appropriated therefor and partly upon adjoining land, so that such structures cannot be divided upon the line between such lands without manifest injury thereto. The jury, in assessing compensation to any owner of land appropriated under this division shall assess the value thereof in accordance with section 163.14 of the Revised Code. The owner or occupant of such structures shall vacate the same within sixty days after service of summons as required under section 163.07 of the Revised

Code, at no cost to the appropriating agency, after which time the agency may remove said structures. In the event such structures are to be removed before the jury has fixed the value of the same, the court, upon motion of the agency, shall:

(1) Order appraisals to be made by three persons, one to be named by the owner, one by the county auditor, and one by the agency. Such appraisals may be used as evidence by the owner or the agency in the trial of said case but shall not be binding on said owner, agency, or the jury, and the expense of said appraisals shall be approved by the court and charged as costs in said case.

(2) Cause pictures to be taken of all sides of said structures;

(3) Compile a complete description of said structures, which shall be preserved as evidence in said case to which the owner or occupants shall have access.

(C) Any time after the deposit is made by the public agency under division (A) or (B) of this section, the owner may apply to the court to withdraw the deposit, and such withdrawal shall in no way interfere with the action except that the sum so withdrawn shall be deducted from the sum of the final verdict or award. Upon such application being made the court shall direct that the sum be paid to such owner subject to the rights of other parties in interest provided such parties make timely application as provided in section 163.18 of the Revised Code. Interest shall not accrue on any sums withdrawable as provided in this division.